SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964.

No. 1004

AIR DISPATCH, INC., NATIONAL FILM CARRIERS, INC., FILM CARRIER CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS, INC. and AIR FREIGHT FORWARDERS ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	4
STATEMENT OF THE CASE	6
I. C. C. Report and Order	6
Air Freight Forwarders	6
The Questions Are Substantial	8
A. The Legislative Histories of Both the Federal Aviation Act and the Interstate Commerce Act Clearly Demonstrate the Intent of Congress to Place All Through-Bill Joint Air-Motor Transportation Exclusively Under the Economic Control of the Civil Aeronautics Board	9
B. The Language of the Interstate Commerce Act Negates Any Economic Control by the I. C. C. Over Air Forwarders	12
(1) Section 203(b)(7a) of the I. C. C. Act Does Not Provide the Jurisdiction Claimed	12
(2) The I. C. C. Definition of Interstate Commerce Clearly Eliminates Control Over Commerce Partly by Motor and Partly by Air	13
C. The C. A. B. and I. C. C. Have Collided	14
D. The Federal Aviation Act Provides Adequate Redress of Grievances for All if Suffered by C. A. B. Action	16

INDEX (Continued).

Page

E. The Opinion of the Lower Court Should Not Remain Determinative, as It Is Based Upon a Misunderstanding of the Problem and Inconsistent Holdings 17

F. This Court Should, as It Has in the Past, Resolve the Important Question of Agency Jurisdiction 19

CONCLUSION 21

TABLE OF CASES CITED.

	Page
AAA Air Express, Inc., MC 124523	8
Continental Casualty Co. v. United States, 314 U. S. 527 (1941)	14
Ford v. United States, 273 U. S. 593 (1926)	14
Interstate Commerce Commission v. Agricultural Cooperative Association, 34 F. R. D. 497 (1964)	14
Interstate Commerce Commission v. Blue Diamond Products Co., 192 F. 2d 43 (8th Cir. 1951)	14
J. B. Montgomery, Inc. v. United States and Interstate Commerce Commission, 206 F. Supp. 455 (D. C. Colo. 1962) affirmed 376 U. S. 389 (1964)	12
Las Vegas Hacienda, Inc. v. Civil Aeronautics Board, 298 F. 2d 430 (9th Cir.), *cert. den.* 369 U. S. 885 (1962)	10
Pan American Airways v. United States, 371 U. S. 296 (1963)	20
Philadelphia, City of v. Civil Aeronautics Board, 289 F. 2d 770 (D. C. Cir., 1961)	8
Twentieth Century Delivery Service, Inc. v. St. Paul Fire & Marine Insurance Co., 242 F. 2d 292 (9th Cir. 1957)	16
Wyckoff Company, Inc. v. United States, Civil Action C-108-62 (D. C. Utah)	19
Zantop Air Transport, Inc. v. United States, Civil Action 25662 (D. C. E. D. Mich.)	19

STATUTES.

	Page
Interstate Commerce Act, 72 Stat. 737 as amended 49 U. S. C. 1 et seq.:	
Section 203(a)(10)	4
Section 203(b)(7a)	4, 12, 13, 19
Federal Aviation Act; 72 Stat. 737, 49 U. S. C. 1301 et seq.:	
Section 101(21)	4
Section 102	4
Section 404	5
Section 403(a)	18
Section 1006(a)	17
Air Commerce Act of 1926, 44 Stat. 568, 49 U. S. C. § 171	9, 14

MISCELLANEOUS.

	Page
1941 House Committee Report, H. Rep. 1172, 77th Cong., 1st Sess., pp. 6-7 (1941)	10

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Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania from which this appeal is taken is reported at 237 F. Supp. 450 (1964) and is printed in the Appendix hereto at pages 1a to 6a. The report and order of the Interstate Commerce Commission which was the subject of the District Court proceedings is reported at 95 M. C. C. 71 (1964) and is printed in the Appendix at pages 7a to 45a.

JURISDICTION.

The jurisdiction of this court is conferred by 28 U. S. C. § 1253 as this is an appeal from a three-judge district court. This is a civil action under 28 U. S. C. §§ 1336, 2284, 2321 and 2325, and 5 U. S. C. § 1009 to set aside an order of the Interstate Commerce Commission. The decision of the District Court was entered on December 22, 1964. The notice of appeal was filed by appellants on February 9, 1965 in the District Court for the Eastern District of Pennsylvania.

QUESTIONS PRESENTED.

The Interstate Commerce Commission has attempted to issue regulations enabling it to establish area boundaries for *air carriers* differing in extent from those areas previously established by the Civil Aeronautics Board; the Commission specifically stating it would not be bound by the Board's prior determination.

Air Dispatch, Inc., an appellant, holds authority from the Civil Aeronautics Board to provide, under a single bill of lading, transportation involving motor vehicle pick up service, aircraft carriage and motor vehicle delivery service. The proposed regulations would subject it to an immediate threat of constriction or even elimination by the Interstate Commerce Commission of a well-established heavily capitalized service area *previously approved by the Civil Aeronautics Board.*

It should be initially made clear that the only transportation involved here is that performed under "through-air bills of lading" providing bona fide pick up and delivery service by motor vehicle operating in a continuous movement in joint air-motor transportation.

The following questions are presented for determination upon this appeal:

1. When Congress in 1938 created the Civil Aeronautics Authority (now Civil Aeronautics Board) to coordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics, charged that agency with the duty to promote and develop air transportation, defined air transportation to include transportation "partly by aircraft and partly by other forms of transportation," contemporaneously expressly withdrew from the Interstate Commerce Commission economic regulatory jurisdiction over motor vehicle transportation "incidental to transportation by aircraft", did Congress intend that the Interstate Commerce Commission should have the authority to veto a decision by the Civil Aeronautics Board defining the scope of air transportation of property by aircraft?

2. Does not the Civil Aeronautics Board have the authority to determine when joint motor-air transportation is "air transportation" as defined in the Federal Aviation Act and therefore exempt from economic regulation by the Interstate Commerce Commission?

3. Has the Interstate Commerce Commission the authority to review the action of the Civil Aeronautics Board in accepting tariffs filed by an air carrier providing charges for collection and delivery service by motor vehicle or the authority to independently establish appropriate boundaries differing in extent from the terminal areas of such air carrier as defined in its tariff filed with and accepted by the Civil Aeronautics Board?

4. Can the Civil Aeronautics Board disclaim jurisdiction over the transportation services in connection with air transportation, which are vested in it by Congress, and by conference agreement vest such jurisdiction in the Interstate Commerce Commission?

5. Did the opinion of the lower court from which this appeal is taken properly consider and determine the issues before it?

STATUTES INVOLVED.

Section 101(21) of the Federal Aviation Act, 72 Stat. 737 (49 U. S. C. 1301):

> Interstate air transportation . . . mean[s] carriage by aircraft of persons or property as a common carrier for . . . hire . . . in commerce between (a) a place in any state of the United States . . . and a place in any other state of the United States . . . whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Section 203(a)(10) of the Interstate Commerce Act, 49 Stat. 544 as amended, 49 U. S. C. Section 303(a)(10):

> The term "interstate commerce" means commerce between any place in a state and any place in another state . . . whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water.

Section 203(b)(7a) of the Interstate Commerce Act, 49 Stat. 544 as amended, 49 U. S. C. Section 303(b)(7a):

> Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment, shall be construed to include . . . the transportation of persons or property by motor vehicle when incidental to transportation by aircraft.

Section 102 of the Federal Aviation Act, 72 Stat. 740, 49 U. S. C. 1302:

> In the exercise and performance of its powers and duties under this chapter, the Board shall consider

the following among other things as being in the public interest and in accordance with public convenience and necessity; (a) the encouragement and development of an air transportation system . . . (b) the regulation of air transportation in such manner as to recognize and preserve the inherent advantages of . . . and foster sound economic conditions in, such transportation . . . (c) promotion of adequate, economical and efficient service by air carriers at reasonable charges without unjust discrimination, (or) undue preferences or advantages.

Section 404, of the Federal Aviation Act, 72 Stat. 760, 49 U. S. C. 1374:

(a) It shall be the duty of every air carrier to provide and furnish interstate * * * air transportation, as provided by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation * * *; to provide safe and adequate, equipment, facilities in connection with such transportation.

STATEMENT OF THE CASE.

I. C. C. Report and Order.

The report and order here appealed from (pp. 7a-45a) was issued on May 8, 1964. The order promulgated regulations (pp. 40a to 42a) creating definite limitations as to what motor vehicle transportation shall be considered exempt from the Interstate Commerce Commission regulation and under what circumstances air freight forwarders (admittedly "air carriers" subject to regulation by the Civil Aeronautics Board) may use the facilities of a certificated motor carrier.

These regulations contain the assertion that the Interstate Commerce Commission, upon its own motion or upon a petition by an interested person, has the right to determine *de novo* the area within which an authorized air carrier may carry out its motor transportation and that such area can be changed and limited by order of the Commission alone (p. 41a, subparagraph c).

Air Freight Forwarders.

Appellant Air Dispatch Inc. is an air freight forwarder authorized to carry on its business by the Civil Aeronautics Board, Operating Authorization No. 40 of November 14, 1956. The other appellants are either associations of other air freight forwarders or interested intervening parties.

Air freight forwarders as an industry have developed an effective customer-oriented pick up and delivery service through operation of their own vehicles or by arrangement with motor carriers.

It has principally been the air freight forwarders who have made efforts to provide an integrated air-ground transportation service to the shipper *on a single through airway bill.* The air freight forwarder offers a single rate, single responsibility and expedited service in picking up

and delivering parcels, small or large, for transportation by air from consignor to consignee—that is, from door-to-door.

Generally a shipper will request an air forwarder to pick up parcels, small or large, for transportation by air to its consignee. The forwarder issues a through-air bill of lading, the shipment is picked up by motor vehicle and carried with other shipments to the air terminal chosen by the forwarder to furnish the air carriage. Here it is consolidated for shipment on a scheduled air line chosen by the forwarder. Upon the completion of the air portion, the same forwarder, through his agent, breaks the consolidated shipment down and distributes the packages to the various consignees.

This type of service is today restricted to narrowly circumscribed areas around airport cities—generally 25 miles radius. It is the expansion of these so-called C. A. B. "terminal areas" which is now under I. C. C. veto.

Beyond the existing terminal areas the rest of the nation still awaits the benefits of air transportation. Beyond the existing terminal areas, I. C. C. regulated over-the-road common carrier service must be used—and only such transportation. Same day service is impossible. Next day service becomes second day service. Second day service extends to third day, or more. If scheduled I. C. C. regulated motor carriers must be utilized at both ends of the air haul, four or five-day service is often the best that can be achieved.

To effect the most expeditious air movement, the air freight forwarder must be permitted to use its expert knowledge of both motor and air transportation services in selecting the airport and air line having the capacity and schedule for the destination airports. The Interstate Commerce Commission itself has recognized the unique service performed by air forwarders as recently as February 19, 1964. "The Commission has consistently noted that general freight carriers are not equipped to meet the

specialized needs of the air freight industry." *A. A. A. Air Express Inc.*, MC 124523.

The Questions Are Substantial.

Control of the motor transportation performed as part of air transportation is as vital as the regulation of the aircraft itself.

The problem at hand is which of two regulatory bodies, the Interstate Commerce Commission (I. C. C.) or the Civil Aeronautics Board (C. A. B.), has been given Congressional authority to regulate through-air bill motor vehicle transportation and by what method the exercise of such authority is to be reviewed.

Did Congress intend the C. A. B. to control this transportation or did it intend the I. C. C. to have the power, if and when it chose, to restrict rights *already granted* to air carriers by the C. A. B.?

This is the issue and the decision thereon will be national and affect an industry now consisting of 90 air forwarders with a total gross revenue of approximately $175 to $200 million per year.

Is this industry to be subjected to regulation by two Federal Agencies with no clear delineation as to which has final determinative power, or is it to be regulated by one agency with clear legislative criteria and a distinct review procedure available to all interested persons?

The former situation will produce uncertainty, excess costs, dual application, unsynchronized regulation and hesitancy of vital investment capital.

The latter will provide clear, concise and uniform regulation such as will encourage an ever-growing industry and promote the desired, adequate, economical and efficient service by air carriers, leading to the development of an air transportation system properly adapted for the future needs of United States commerce.

City of Phila. v. C. A. B., 289 F. 2d 770 (D. C. Cir. 1961) presents a perfect example of the havoc which would

be presented to the industry were these regulations to be effective. There the C. A. B. held a 90-mile truck movement from Newark, N. J. to Philadelphia, Pa. to be "air transportation" when performed under a through-bill from the Pacific coast. The circuit court sustained such holding.

Would it not have been chaotic to have had the Interstate Commerce Commission later determine, as it now could under the proposed rule, that this 90-mile truck haul was *not* air transportation and to have permitted the Commission to issue a cease and desist order no matter how much time, effort and money the air carrier had expended in developing this commerce from Philadelphia.

This appeal is to delineate agency authority over such through-bill joint air-motor transportation so that the expansion and development of air cargo may proceed under reasonable, uniform and clear criteria.

A. The Legislative Histories of Both the Federal Aviation Act and the Interstate Commerce Act Clearly Demonstrate the Intent of Congress to Place All Through-Bill Joint Air-Motor Transportation Exclusively Under the Economic Control of the Civil Aeronautics Board.

The *presence* of specific authority in the Federal Aviation Act and the *absence* of any such authority in the Interstate Commerce Act clearly shows Congress to have intended motor transportation used on through-air bills of lading to be placed under the economic control of the C. A. B.

Commencing with the Air Commerce Act of 1926 which defined Air Commerce as transportation "in whole *or in part* by aircraft of persons or property for hire" and continuing through the Civil Aeronautics Act of 1938 and its reenactment in the Federal Aviation Act of 1958, the plain meaning of the statutes and the express legislative history indicate that where this joint through air-motor transpor-

tation was concerned, its control was designed to be under the C. A. B.

The reasons for concluding this are:

(1) The Congressional legislative hearings prior to the enactment of the Civil Aeronautics Act of 1938 are replete with heated discussions as to whether jurisdiction over air transportation should be placed in the Interstate Commerce Commission or in the Civil Aeronautics Board as proposed by that bill. After much debate on this question the issue was resolved in favor of the C. A. B. which was given control of air transportation *as therein defined.*

(2) A 1941 report of the House Committee on Interstate and Foreign Commerce which dealt with Part IV of the Interstate Commerce Act covering surface freight forwarders stated:

> "Air forwarders and forwarding by air are now subject to the jurisdiction of the Civil Aeronautics Act of 1938 and the provisions of this definition and the other parts of the bill are written with a view to leaving that jurisdiction undisturbed and to avoid a duplication of regulation."

(3) The definition of interstate air transportation in both the 1938 and 1958 Acts states that it includes commerce moving "partly by aircraft and partly by other forms of transportation." The definition contains no specific limitation as to the other forms of transportation to be used.

(4) The C. A. B. was provided affirmative statutory duties under the Federal Aviation Act. In *Las Vegas Hacienda, Inc. v. C. A. B.*, 298 F. 2d 430, 438 (9th Cir. 1962), *cert. den.* 369 U. S. 885 (1962), the court pointed out that the legislative history emphasizes the importance attached by Congress to these duties which inter alia included "(1) the encouragement and development of an air transportation system; (2) the regulation of air transportation

so as to preserve its inherent advantages; and (3) the promotion of adequate, economic and efficient service by air carriers."

Appellant's position is further supported by the provisions of the Federal Aviation Act wherein the C. A. B. is given the authority to regulate the rates of the ground services provided. The Board has also issued regulations defining an air freight forwarder as an indirect air carrier which in the ordinary course undertakes to assemble and consolidate property "and is responsible for the transportation of property from the point of receipt to the point of destination."

The Civil Aeronautics Board has issued its own report and order (Regulation ER-407 of April 28, 1964) admittedly corollated to the report and order of the I. C. C. here appealed, in which the Board concludes the following:

1. Full development of air cargo transportation depends in large measure upon efficient surface transportation.

2. Effective customer oriented pick up and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder.

3. This control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder.

4. A reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pick up and delivery services and to test their adequacy and economy is vital to prevent the stifling of the potential of air cargo transportation.

Obviously if the C. A. B. cannot exclusively regulate all aspects of air transportation including the truck haul portion, it will be unable to cope with the problems of moving traffic between community and airport. Neither

could it properly test the carrier's adequacy and economy which it concludes is vital to the development of the air transportation system, which Congress has placed in the C. A. B. hands, 49 U. S. C. § 1302.

B. The Language of the Interstate Commerce Act Negates Any Economic Control by the I. C. C. Over Air Forwarders.

The Commission admits (p. 20a) that "there is no provision of the act conferring specific authority to determine what motor operations are within Section 203(b)(7a)." As was noted in the recent case of *J. B. Montgomery, Inc. v. U. S. and I. C. C.*, 206 F. Supp. 455, 461 (D. C. Colo. 1962), aff'd 376 U. S. 389 (1964), "The fact that Congress has expressed an intention that the act be administered to the end of developing and preserving an adequate, efficient and economical transportation system does not give to the Commission unlimited authority to proceed in any manner which the Commission believes will accomplish these objectives. *The Commission in accomplishing the objectives must proceed within the limit of its statutory authority,* and we find no such authority to impose the restrictions in question." (Emphasis added.)

(1) Section 203(b)(7a) of the I. C. C. Act Does Not Provide the Jurisdiction Claimed.

The Interstate Commerce Commission rests its authority to regulate the involved transportation primarily upon Section 203(b)(7a) of the I. C. C. Act even in the face of its plainly exclusionary language that "nothing in this part . . . shall be construed to include . . . the transportation of persons or property by motor vehicle when incidental to transportation by aircraft."

This section was placed in the Interstate Commerce Act by the Civil Aeronautics Act of 1938. That Act clearly delineated the control of joint through air-motor trans-

portation to be in the C. A. B. not only by the extensive overall plan envisaged by the Act but by its definition of C. A. B. regulated transportation as including that "partly by air and partly by other modes of transportation."

Throughout the history of Section 203(b)(7a) the I. C. C. and others have referred to it as an "exemption" whereas in fact it is an *exclusion*. This is not a mere question of semantics but is meaningful in determining Congressional intent. The term *nothing shall be construed to include* is truly exclusionary language whereas *exemption* implies a remainder after the portion which is exempt has been removed.

The I. C. C. Act never mentioned or referred to air transportation until the time of insertion of Section 203(b)(7a) in 1938. This section does not place any control in the I. C. C. but to the contrary the clear meaning of the section's language is that no part of the act is to be considered to create any such control.

The I. C. C. however, apparently takes the unique position that an exclusionary clause provides control over a portion of the excluded authority.

(2) The I. C. C. Definition of Interstate Commerce Clearly Eliminates Control Over Commerce Partly by Motor and Partly by Air.

The definition of interstate commerce as contained in Part II of the I. C. C. Act (49 U. S. C. § 303(a)(10)) limits the authority of the Commission to regulation only in connection with commerce which is transportated totally by motor vehicle or partly by motor vehicle and "partly by rail, express or water."

The citing of the specific modes of joint transportation clearly demonstrates the intent of Congress to restrict the authority of the I. C. C. to the regulation of only those three specific joint modes.

The Commission cannot create by interpretative fiat jurisdiction or authority not conferred by Congress.

A basic and long-enduring criterion of construction in the law has been "expressio unius est exclusio alterius" —an expression of one thing is the exclusion of another. This rule of construction has been given recognition innumerable times by this Court. See e.g., *Ford v. United States*, 273 U. S. 593 (1926) and *Continental Casualty Company v. United States*, 314 U. S. 527 (1941). See also *Interstate Commerce Commission v. Blue Diamond Projects Co.*, 192 F. 2d 43, 46 (8th Cir. 1951) and *Interstate Commerce Commission v. Agricultural Cooperative Association*, 34 F. R. D. 497, 498 (1946).

This conclusion is strengthened by the fact that at the time of the enactment of this definition there was in existence in the Air Commerce Act of 1926 a definition of *air commerce* as including transportation "in whole or in part by aircraft" without any limitation as to the other modes of the joint transportation.

The Commission cannot point to any specific definitive grant of power in support of its assumed authority to economically regulate air forwarders, but relies solely upon inference, implication and innuendo.

C. The C. A. B. and I. C. C. Have Collided.

In August, 1961, the C. A. B. published a Notice of Proposed Rule Making in which it proposed to extend to 50 miles the areas around airport cities in which air carriers and air freight forwarders could pick up and deliver property moving by air. The terminal areas for New York and Chicago were proposed to be extended considerably beyond 50-miles in recognition of the economic realities of air cargo distribution and collection at these, the greatest air cargo generating points in the nation. EDR-33, C. A. B. Docket No. 12951, August 23, 1961.

The I. C. C. truckers, which have always been hostile to the development and expansion of air cargo, struck at

this effort by the C. A. B. to bring air transportation pick up and delivery zones into conformity with the present realities of economic and industry development. The 25-mile zone was long out-moded and determination of terminal areas on an *ad hoc* basis for each of the several hundred certificated air points was, as the Board pointed out, "administratively unworkable."

The I. C. C. truckers petitioned the I. C. C., charged with fostering and protecting them, to institute a proceeding of its own which would narrowly define the "incidental to air" section 203(b)(7a) of the Motor Carrier Act and thus collide with, and hopefully counteract and contain the C. A. B.'s efforts to expand air freight service.

The move was successful. After informal discussions between the two agencies, the C. A. B., always ambivalent as to the extent of its power to define air freight terminal areas, capitulated completely to the I. C. C. The C. A. B. and I. C. C. contemporaneously published regulations under which the C. A. B. retreated to the 25-mile radius and provided for expansion only on an *ad hoc* individual-petition-basis, a procedure which the C. A. B. had itself previously pronounced "administratively unworkable."

Air freight is thus locked in a straight-jacket and the I. C. C. has possession of the key. The C. A. B. has acquiesced in the arrangement, styled with false euphemism as a reasonable accommodation of the duties of the two agencies under their respective statutes, but more properly, a total surrender to the I. C. C. of the C. A. B.'s statutory duty.

The C. A. B. has thus purported to stand aside and let violence be done to the manifest Congressional intent that the older forms of transportation and their regulatory body, the I. C. C., should not be permitted to narrowly limit the scope of ground services as a part of air transportation and thereby retard the proper growth of air transportation.

The Court below misunderstood the significance of what had happened. It found that "no conflict between the Board and the Commission has arisen." There is no "conflict" now because the C. A. B., after informal discussion, has illegally abdicated its legislative directive. Nor will there be any conflict in the future under this arrangement because the C. A. B. has renounced its original determination to bring air freight terminal area definitions into conformity with the needs of contemporary air shippers and has retreated to the 25-mile rule of thumb in existence since before World War II—and even there it concedes it is so doing only by grace of and under grant from the I. C. C. It will make *ad hoc* extensions under a conservative policy, since it knows the I. C. C. will over-ride any liberalization, as the I. C. C. has indeed already vetoed the 50-mile extension.

D. The Federal Aviation Act Provides Adequate Redress of Grievances for All if Suffered by C. A. B. Action.

Even if the I. C. C. or others believe that it will adversely affect industry if the I. C. C. lacks the authority to impose restrictions on the transportation here in question, this is a matter for consideration by the Congress and is not justification for the Commission or Courts to write into Congressional legislation something which is neither evident from the Acts nor from the legislative histories.

The obvious forum to determine the legality of the C. A. B. authority under which an air carrier is operating is, prima facie, the C. A. B.

As the Ninth Circuit said in the *20th Century Delivery Service v. St. Paul's Fire & Marine Ins. Co.*, 242 F. 2d 292 (9th Cir. 1957) at page 302, "under these provisions [C. A. B. Act] and similar provisions of other enactments, it is well settled that questions of the reasonableness of rates and practices are to be left to the administrative agency in the first instance, and that under this doctrine of

'primary jurisdiction' the provisions of the tariff properly filed with the Board and within its authority are deemed authority until rejected by *it*." (Emphasis added.)

It is to be assumed that the C. A. B. will carry out its legislative mandate and that it will interpret its authority correctly. If, however, it does not, recourse to all parties is available in the Federal Courts (49 U. S. C. § 1486(a)).

Certainly, it is not within the power of the I. C. C. to censor, overrule, or limit the legitimate exercise of legislatively delegated power by the C. A. B.

E. The Opinion of the Lower Court Should Not Remain Determinative, as It Is Based Upon a Misunderstanding of the Problem and Inconsistent Holdings.

In Judge Davis' opinion during the introductory discussion, the court states as a holding (p. 2a):

> "This service by motor carrier is exempt from economic regulation by the I. C. C. where the collection or delivery is a part of the continuous movement of goods in air transportation *on a through bill of lading* issued by the direct air carrier or the air freight forwarder." (Emphasis added.)

If this is true, as appellants herein believe it to be, the I. C. C. does not have the power to regulate the through-bill joint air motor transportation here involved. However, in the proposed regulations the Commission has reserved control in the very situation Judge Davis states to be exempt.

The court in reaching its ultimate decision makes the following points, neither of which is logically valid.

The first is a rebuttal to the argument presented by the appellants that the Congressional definitions of *interstate commerce* and *air transportation* are definitive in the case.

In striking down this argument the court states only (p. 4a):

> "It cannot conceivably be argued, and the plaintiffs have not attempted to do so, that where railroads or buses are used in connection with air transportation the Board would have the jurisdiction to regulate this movement of property."

Joint bus-aircraft transportation and joint air-rail transportation were of course not in the case and therefore not mentioned. However, because the appellants did not make these arguments, the court apparently concludes that the argument made must necessarily fall.

For the lower court to dispose of a legitimat argument on the grounds that two other inapplicable arguments were not made and could not be made is illogical, meaningless and no answer.

The court also disposes of appellant's argument that under Section 403(a) of the Federal Aviation Act the Board has been given regulation over motor vehicles involved in pick up and delivery service in connection with air transportation. The Court correctly recites that this section requires *air carriers* to include in tariffs submitted to C. A. B. the charge for such pick up and delivery service.

The court thereafter states (p. 4a) that "to construe this language as jurisdiction to economically regulate the motor carriers performing the service is to strain the plain meaning of the Section."

The District Court fails to realize that the term "air carriers" as used in Section 403(a) includes air forwarders which can perform forwarding services only by use of motor vehicles and many of which operate their own motor vehicles. Since the section requires the tariffs for such pick up and delivery service to be approved by C. A. B. and, lacking such approval, the tariffs are considered illegal, it cannot reasonably be said that such C. A. B. control is not economic.

The Court ultimately holds (p. 6a) that the I. C. C. has the jurisdiction to define the scope of the exemption granted in Section 203(b)(7a), stating that this determination is dispositive of the litigation.

However, the issue presented to the lower court was not whether the I. C. C. had jurisdiction *to define* the scope of 203(b)(7a) but, rather, did it define the scope *properly* by asserting jurisdiction over transportation already subject to the Civil Aeronautics Board.

The issues raised in this appeal are also now pending determination in at least two other federal districts where complaints have been filed against the Interstate Commerce Commission. These cases are *Zantop Air Transport Inc. v. United States* in the Eastern District of Michigan and *Wyckoff Company Inc. v. United States,* District of Utah. These courts will be confronted with the very same decision as confronted the lower court in this appeal. It is important that this issue be determined on a national basis.

The opinion of the lower court therefore should not stand as being determinative of the issue involved since it did not resolve that issue. Indeed, in the body of its opinion (p. 2a) the court stated the law *to be as the appellants herein contend:*

> "Service by motor carrier is exempt from economic regulation by the I. C. C. where the collection or delivery is a part of the continuous movement of goods in air transportation on a through bill of lading issued by the direct air carrier or the air freight forwarder."

F. This Court Should, as It Has in the Past, Resolve the Important Question of Agency Jurisdiction.

The I. C. C. and C. A. B. represent that they have resolved the conflict in their jurisdictions. This was not a resolution but a renunciation by the C. A. B. to the I. C. C.

that it should not have made and is not authorized by law to make. This Court has been called upon to review similar action by the C. A. B. in the past. Plenary consideration with briefs on the merits and oral argument, is required here to resolve this substantial question of which agency should interpret the meaning and scope of "air transportation."

In *Pan American Airways v. U. S.*, 371 U. S. 296 (1963), this Court was called upon and did grant plenary consideration to the C. A. B.'s abdication of responsibility to decide antitrust issues. In that case, the abdication was to the courts. In this case it is to the I. C. C. The cases, however, are indistinguishable in principle.

In the *Pan American* case this Court analyzed the Civil Aeronautics Act and its purpose and concluded that it would be "strange indeed" and "odd" to conclude that divisions of territories, allocations of routes or affiliations between carriers which met the requirements of "public interest" should run afoul of the antitrust laws. This Court held that this determination "is peculiarly a question for the Board, subject, of course, to judicial review." 371 U. S. at 309. The controlling consideration which this Court pointed out was that,

> "the particular relation of this problem to the general process of encouraging development of new fields of air transportation makes it all the more appropriate that the Board should decide." 371 U. S. at 311

These same considerations apply with at least as compelling force to the instant case. Only if this Court acts to free the C. A. B. of the I. C. C.'s dead hand, will the C. A. B. be able to carry out its statutory responsibility of "encouraging development of new fields of air transportation."

The C. A. B. is the single repository of "all of the existing functions of the Federal Government with respect to Civil Aeronautics." 371 U. S. at 304.

The C. A. B. must be directed by this Court to carry out its duty. The way it carries it out will, of course, be subject to judicial review. But it cannot legally in the first instance surrender to I. C. C. the decision which is the C. A. B.'s alone.

CONCLUSION.

For the foregoing reasons the questions presented by this appeal are substantial and of nation-wide importance. In view of the federal agency conflict involved and the wide application of the Commission's regulations upon air forwarders, the Court should exercise its jurisdiction to correct the judgment below.

Respectfully submitted,

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Dated: March 19, 1965

Appendix.

OPINION.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 36000.

AIR DISPATCH, INC.

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

December 22, 1964.

DAVIS, *J.*

This action was instituted by the filing of a complaint to set aside the report, order and regulations adopted by the Interstate Commerce Commission (Commission or I. C. C.) on May 4, 1964 in No. MC-C-3437, *Motor Transportation of Property Incidental to Transportation by Aircraft.* A statutory three-judge court was impaneled pursuant to Title 28, U. S. Code, Sections 2284 and 2321-2325 (28 U. S. C. A. 2284, 2321-25). On June 23, 1964, after hearing, the Court entered a temporary restraining order setting aside the Commission's order until a final decision by the Court. Briefs were submitted by the parties and numerous interested parties which participated in the Com-

mission's rule making proceedings have been granted leave to intervene. Oral argument was held on November 9, 1964 and decision was reserved.

Air Dispatch, Inc. and intervenor-plaintiffs (hereinafter referred to collectively as plaintiffs) attack the Commission's statutory authority to promulgate the regulations here involved on the ground that the Commission lacks the jurisdiction to determine when motor carrier transportation is a part of air transportation. Plaintiffs assert that the Civil Aeronautics Board (C. A. B. or Board) is the exclusive arbiter of this question by virtue of sections 101 (20) and (21), 102, 403(a), 404 and 412(a) of the Federal Aviation Act of 1958.

Plaintiffs are air freight forwarders, or indirect air carriers, and are engaged in the collection, delivery or transfer of shipments which have been received from, or will be delivered to, an airline or direct air carrier. The service rendered by the plaintiffs at either or both ends of the line-haul movement of goods by the airline is an integral and necessary part of the fast and efficient service available to shippers using air transportation.

This service by motor carrier is exempt from economic regulation by the I. C. C. where the collection or delivery is a part of the continuous movement of goods in air transportation on a through bill of lading issued by the direct air carrier or the air freight forwarder. This exemption[1] is set out in Section 203(b)(7a) of the Interstate Commerce Act which reads in part as follows:

> "Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include . . . the transportation of persons or property when incidental to transportation by aircraft. . . ."

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1. Plaintiffs prefer to label this an exclusion but for purposes of this opinion the semantic battle is resolved in favor of exemption.

This section was inserted in the Interstate Commerce Act by section 1107(j) of the Civil Aeronautics Act of 1938.[2] The scope of this exemption had initially been discussed in several I. C. C. cases[3] and was fully examined in *Kenny Extension-Air Freight*, 49 M. C. C. 182 (1949), 61 M. C. C. 587 (1953). This decision established the exemption to encompass the motor carrier transportation of property in the collection, delivery or transfer of shipments when made in connection with a prior or subsequent line-haul movement by an air carrier, as a part of a continuous movement under a through bill-of-lading. The through bill-of-lading covers the line-haul movement by the direct air carrier and the collection, delivery or transfer service by motor carrier rendered by the indirect air carrier. The *Kenny* decision also held that such motor carrier service must be performed within the terminal area of the air carrier filed with the C. A. B.[4] It is the position of the defendant that certain of the regulations here under attack are merely a codification of the foregoing *Kenny* doctrine.

Since the I. C. C. in the *Kenny* case assumed that the terminal areas approved by the C. A. B. would be reasonable, and therefore acceptable to the I. C. C., the plaintiffs maintain that the present regulations overrule the *Kenny* decision. The plaintiffs point out that a determination by the C. A. B. as to a reasonable terminal area may be completely overruled by the I. C. C. if it determines that such motor transportation is not incidental to air transporta-

2. The issue arose at oral argument whether section 203(b)(7a) of the I. C. C. Act was repealed when the Civil Aeronautics Act was replaced by the Federal Aviation Act of 1958. The determination of this question is not necessary for the disposition of this action and will therefore not be decided at this time.

3. See *Sky Freight Delivery Service, Inc., Com. Car. Application*, 47 M. C. C. 229; *Teterboro Motor Transp., Inc. Com. Car. Application*, 47 M. C. C. 247; *Graff Common Carrier Application*, 48 M. C. C. 310.

4. The *Kenny* doctrine now covers the terminal area filed by the indirect air carriers (plaintiffs). *Panther Cartage Co. Extension-Air Freight*, 88 M. C. C. 37 (1961).

tion.[5] This argument resolves itself into the question of who will decide the reasonableness of any given terminal area?

Jurisdiction to regulate air transportation is lodged in the C. A. B. and air transportation is defined as "transportation partly by aircraft and partly by other forms of transportation.". 49 U. S. C. A. 1301 (21). Interstate Commerce is defined to include commerce between states whether such commerce moves "wholly by motor vehicles or partly by motor vehicles and partly by rail, express or water."[6] 49 U. S. C. A. 303 (10). It follows, the plaintiffs argue, that the Commission was to regulate motor vehicle transportation in connection with transportation by means other than aircraft and the Board was to regulate all forms of transportation used in connection with transportation by aircraft. It cannot conceivably be argued, and the plaintiffs have not attempted to do so, that where railroads or buses are used in connection with air transportation the Board would have the jurisdiction to regulate this movement of property.

The plaintiffs attempt to construe Section 403(a) of the F. A. A. as a grant to the Board of jurisdiction over motor vehicles involved in pick-up and delivery service ". . . in connection with . . . air transportation." This section requires the air carriers to include in their tariffs filed with the C. A. B. the charge for such pick-up and delivery service. To construe this as jurisdiction to economically regulate the motor carriers performing this service is to strain the plain meaning of the section beyond its limit.

It cannot be argued that the Commission lacks jurisdiction to regulate all common carriers (motor vehicles)

5. This possible conflict could be avoided through the use of a Joint Board as provided in Section 1003 of the Federal Aviation Act, 49 U. S. C. A. 1483.

6. It was suggested at oral argument that the "express" mentioned in the definition of Interstate Commerce was "air express" as known in 1935.

involved in the movement of goods in interstate commerce to the extent that the issue involved pertains to (1) the qualifications of employees of the common carriers, (2) the maximum hours of work by employees, (3) the safety regulations to be followed by the carriers, or (4) the equipment standards to be met by the carriers. The Commission also has authority to economically regulate all motor vehicles involved in interstate commerce except when the motor vehicles are used exclusively in the collection, delivery or transfer of goods incidental to transportation by aircraft. Excluding this partial exemption of Section 203. (b)(7a), the Commission has regulatory authority over all motor vehicles in interstate commerce. The determination of the scope of this exemption from economic regulation must logically fall on the Commission. Whether this determination is accomplished on an ad hoc basis as in *Kenny* and the cases following that decision, or by use of the rule making power does not alter the right to make such a determination.

The plaintiffs cite *City of Philadelphia v. C. A. B.*, 289 F. 2d 770 (D. C. Cir. 1961), which held that the motor vehicle transportation of air cargo from Newark to Philadelphia, subsequent to an air movement of the same cargo from California to Newark, was "air transportation" within the meaning of the Federal Aviation Act. This case decided only that the airline involved, Flying Tiger, was fulfilling its obligation to Philadelphia in providing it with adequate air transportation between Philadelphia and California as called for by the certificate of public convenience and necessity issued to Flying Tiger by the C. A. B. The Court did not decide that the Board had economic regulatory jurisdiction over the Newark-Philadelphia truck run nor that such motor vehicle transportation of air cargo was incidental to transportation by aircraft and therefore exempt under Section 203(b)(7a). The Court, by way of dictum, cited with approval the Board's Order disclaiming jurisdiction and indicating the Commis-

sion should determine if the Newark-Philadelphia truck haul is incidental and exempt. We agree. An interline movement of property partly by air and partly by motor vehicle may be air transportation for purposes of providing service to points for which a certificate of public convenience and necessity has been issued and at the same time the motor vehicle portion would not be incidental to the transportation of the property by aircraft.

We find that the I. C. C. has the jurisdiction to define the scope of the exemption granted in Section 203(b)(7a). This determination is dispositive of this litigation since inquiry into the substance of the regulations would be premature. No conflict between the Board and the Commission has arisen nor have these regulations been attacked as an unreasonable exercise of the authority vested in the Commission.

An appropriate order may be submitted by the defendant, Interstate Commerce Commission.

By THE COURT:

JOHN MORGAN DAVIS, *J.*

REPORT OF THE COMMISSION.

Served May 8, 1964

M-11045

INTERSTATE COMMERCE COMMISSION

No. MC-C-3437

MOTOR TRANSPORTATION OF PROPERTY INCIDENTAL TO TRANSPORTATION BY AIRCRAFT

Decided May 4, 1964

Upon notice of proposed rulemaking, regulations adopted prescribing—

1. The circumstances under which motor transportation of property, in interstate or foreign commerce, is transportation incidental to transportation by aircraft within the partial exemption of section 203(b)(7a) of the Interstate Commerce Act.

2. The manner in which air freight forwarders (indirect air carriers) holding authority from the Civil Aeronautics Board may participate in intermodal air-motor transportation in which the motor movement is not within the scope of section 203(b)(7a).

Peter T. Beardsley, F. G. Freund, Bryce Reed, Jr., and *Richard R. Sigmon* for petitioners.

Robert C. Londerholm for the State Corporation Commission of Kansas.

Tyre W. Burton, E. L. McClintock, William Barton, Frank J. Iuen, and *Frank W. May* for the Missouri Public Service Commission.

J. Raymond Clark for the Port of New York Authority.

Frank Kesler for the Oklahoma City (Okla.) Chamber of Commerce.

Paul A. Smith, Max W. Young, Robert C. Dryden, Harry Pohlad, Hugh T. Matthews, M. M. Emery, J. E. Hall, Louis P. Haffer, Harry F. Gillis, C. C. Boyd, August W. Koehler, P. J. Campbell, Joe G. Fender, James J. McNulty, Russell S. Bernhard, Harold S. Shertz, R. E. Fitzgerald, Mert Starnes, Richard A. Stuart, Robert DeKroyft, Drew L. Carraway, John S. Fessenden, Frederick S. Hill, James D. Mann, Robert J. Corber, R. K. Fillingame, Harry D. Pugsley, Albert F. Beitel, G. H. Dilla, and *Edward H. Pollaci, Jr.*, for themselves, motor carriers, air carriers, or other interested persons.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This rulemaking proceeding, instituted October 4, 1961, by division 1 on its own motion, brings before us for determination the circumstances under which, and the areas within which, motor transportation of property, in interstate or foreign commerce, is transportation incidental to transportation by aircraft, and therefore exempt from the economic regulation of this Commission by the terms of section 203(b)(7a) of the Interstate Commerce Act. Our order instituting this proceeding followed closely upon the institution on August 26, 1961, by the Civil Aeronautics Board (C. A. B.) of a proceeding in its Economic Regulation Docket No. 12951, 26 F. R. 8037, looking toward establishment of the limits of zones within which air cargo pickup and delivery services may be provided by air carriers pursuant to appropriate tariffs filed with that agency under the Federal Aviation Act. That proceeding originally contemplated expansion of air terminal areas to include points within 50 miles of the principal cities served by a

given airport. It was terminated by the adoption by the C. A. B., on April 28, 1964, of the regulations contained in appendix II hereto.

Also considered in instituting the instant proceeding was a joint petition filed September 25, 1961, by the 5 trade associations, including the American Trucking Associations, Inc. (ATA), and the 40 motor carriers named in appendix I hereto. Excluded from this proceeding is the transportation of passengers when incidental to transportation by aircraft, which is the subject of another similar proceeding.[1]

On October 17, 1963, we issued a supplemental notice of proposed rulemaking reopening the proceeding and expanding its scope so as to define the appropriate role of air freight forwarders (indirect air carriers) in intermodal air-motor transportation. It was pointed out that information acquired during the course of Commission and staff level meetings with C. A. B. personnel, as well as from representations previously filed herein, indicated that there were substantial barriers against effective air forwarder participation in the considered intermodal carriage. This situation was described as being at least partially attributable to our holding in *Panther Cartage Co. Extension—Air Freight,* 88 M. C. C. 37, and the supplemental notice proposed to eliminate the distinctions made in that decision between shipments moving on the billing of air freight forwarders holding authority from the C. A. B. and those moving on the billing of direct air carriers. It also contained proposed rules which would have allowed an air freight forwarder, subject to certain conditions, to receive from or deliver to an authorized motor common carrier consignments moving from or to points beyond the territorial scope of the incidental-to-air exemption without being considered as being a surface freight forwarder subject to part IV of the Interstate Commerce Act. These

1. No. MC-C-4000, Motor Transportation of Passengers Incidental to Transportation by Aircraft.

proposed rules are essentially the same as those being adopted herein and contained in part B of appendix III.

The order instituting this proceeding and the supplemental notice both provided for participation by motor and air carriers, or any other interested persons,[2] through the submission of written statements of facts, views, and arguments, all of which have been considered. They further stated that such representations would be a part of the record herein, and that no hearings would be scheduled for the receiving of oral testimony unless a need therefor should later appear. The Film Carriers Conference of the ATA, Air Dispatch, Inc., and the National Film Carriers, Inc., in their joint statement, contend that insufficient facts upon which to predicate any regulations are presented, but these parties have not requested oral hearing. Requests for such a hearing are embraced in the responses of the State Corporation Commission of Kansas and Direct Airport Service, Inc., to the supplemental notice. In our opinion, and after examination of the numerous submitted statements, we conclude that an oral hearing is unnecessary.

Historical Background

Section 203(b)(7a) was made part of the Interstate Commerce Act by section 1107(j), under the "Amendments and Repeals" provisions, of the Civil Aeronautics Act of 1938. It provides that "Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include * * * the transportation of persons or property when incidental to transportation by aircraft * * *." A review of the legislative history of that section sheds little light on the limits or extent of the partial exemption provided by section 203(b)(7a). See *Sky Freight Delivery Service, Inc., Com. Car. Application,* 47 M. C. C. 229; and *Hatom Corp. Common Carrier Application,* 91 M. C. C. 725,

2. Appendix I contains a list of the persons filing representations.

which contains a discussion of the section 203(b)(7a) exemption insofar as it relates to the transportation of passengers.

The early decisions of this Commission in which a prior or subsequent movement of property by air was involved,[3] portation of property unless otherwise specified.
do not discuss the scope of the partial exemption in any great detail.[4] With respect to certain applications of the Railway Express Agency, the reports merely concluded that the transportation of air express shipments by motor vehicle was not within the exemption, holding that the service involved a line-haul operation.[5]

The first extended discussions of the meaning of the section 203(b)(7a) exemption did not appear until 1947 when the *Sky Freight* case, *supra,* dealing with the transportation of property, and *Teterboro Motor Transp., Inc., Com. Car. Application,* 47 M. C. C. 247, dealing with the transportation of passengers, were decided. In these two cases, decided on the same date, it was found that transportation, whether of passengers or property, must involve traffic having an immediately prior or subsequent movement by air; that the length of the motor movement is not the sole determining factor particularly in the New York metropolitan area; and that, because of the differing circumstances present at various airports, no definite territorial limit to the exemption could be prescribed.

In the *Sky Freight* case it was held that it is that transportation rendered in the performance of collection, de-

3. All cases hereinafter discussed or cited concerned the trans-

4. *Port Columbus Cab Co. Contract Carrier Application,* 24 M. C. C. 237; *Railway Exp. Agency, Inc., Ext.—West Unity—Middletown,* 31 M. C. C. 363, 366; and *Railway Exp. Agency, Inc., Ext.—Clarksburg—Buckhannon,* 31 M. C. C. 700, 702. The latter two cases merely refer to the *West Warwick* case, cited in footnote 5, in finding the operations there in question were not within the partial exemption of section 203(b)(7a).

5. *Railway Exp. Agency, Inc., Extension—West Warwick, R. I.,* 31 M. C. C. 332, 335 (12 miles); and *Railway Exp. Agency, Inc., Extension—Bristol, R. I.,* 31 M. C. C. 388, 390 (15 miles).

livery, or interline transfer of airfreight within what is a reasonable terminal area for the line-haul air carrier which is "incidental" to the transportation by air. However, it was stressed there that when a particular motor service takes on the character of a connecting-carrier line-haul service and becomes a part of what is essentially a through interline service by connecting carriers of independent status, it cannot any longer be said to be subordinate to, an adjunct of, or "incidental" to any prior or subsequent transportation by aircraft.

In *Golembiewski Common Carrier Application,* 48 M. C. C. 1, 5, division 5, in following the *Sky Freight* decision, concluded:

> We repeat, however, our admonition in that case, that such considerations as door-to-door rates and air-carrier b[illegible]ing and responsibility are not necessarily controlling and would not require a finding of an exempt operation should it appear that the motor-carrier service involved was so extensive as to constitute, in fact, a line-haul part of a through interline service, rather than a bona fide collection or delivery service incidental to air-carrier service.

This admonition in *Golembiewski* was repeated in *Peoples Exp. Co. Extension of Operation—Air Freight,* 48 M. C. C. 393. In that case, a portion of the service proposed was substantially similar to that with which the *Sky Freight* and *Golembiewski* cases,[6] were concerned. In addition, applicant therein contemplated a more extensive service from and to the Newark Airport, with some of the points to be served being over 100 miles from the airport. It was held that the service proposed for the northern portion of New Jersey, particularly in the immediate vicinity of New York City, came within the scope of the exemption and was bona fide transportation "incidental to transpor-

6. These cases, as well as the *Peoples Exp. Co.* case, involve transportation in the vicinity of New York City.

tation by aircraft," but that the service proposed for southern New Jersey was not. Division 5 stated, 48 M. C. C. at 396:

> Motor operations conducted as those proposed, which extend so far as to reach into the territory adjacent to, and served primarily by, another airport clearly take on the character of interterminal line-haul service *in substitution for, rather than incidental to, air transportation.* [Emphasis added.]

Noting the particular problems involved therein, division 5 concluded that, as a public need existed for the proposed service, it was unnecessary for it to determine to what extent the proposed operations were beyond the scope of the exemption. An exception to the above-quoted conclusion in *Peoples Exp. Co.* was recognized when the traffic in question was emergency in character. *Graff Common Carrier Application,* 48 M. C. C. 310.[7]

Section 203(b)(7a) was thoroughly examined in *Kenny Extension—Air Freight,* 49 M. C. C. 182 (1949), 61 M. C. C. 587 (1953). In the first *Kenny* report, it was found that the applicant's proposed operations in the transportation of commodities moving on commercial air-line or air express bills of lading and having an immediately prior or immediately subsequent movement by aircraft between Allegheny County Municipal Airport and the Greater Pittsburgh Airport, located in Allegheny County, Pa., on the one hand, and, on the other, points in Pennsylvania within 50 miles of either of such airports, is transportation by aircraft within the partial exemption provided by section 203(b)(7a) and as such would be exempt from the certificate or permit requirements of part II of the act; and that

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7. This proceeding involved the transportation of passengers and their baggage, but the principles enunciated there with respect to the emergency movement by substituted motor-for-air service have been followed in numerous proceedings involving the transportation of property having a prior or subsequent movement by air.

the application should be dismissed. No one opposed the application at the initial hearing. Upon consideration of a petition for reconsideration and further hearing filed by ATA, the proceedings were reopened for further hearing, and numerous parties [8] were permitted to participate as interveners at the further hearing. In its report on further hearing, division 5 considered the national as well as the local application of the partial exemption, and, in particular, the possibility of inter-agency conflict. Some of the parties of record in the instant proceeding were parties of record in the *Kenny* proceeding, and they advanced there arguments similar to the ones here presented.

Division 5 in the second *Kenny* report [9] found that motor transportation of property to come within the 203 (b)(7a) partial exemption must be confined to transportation, in bona fide collection, delivery, or transfer service, of shipments which have been received from, or will be delivered to, an air carrier as part of a continuous movement under a through bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier. The decision therein clearly distinguishes between motor transportation on behalf of an air carrier within the air carrier's terminal area, on the one hand, and, on the other, transportation which, although essentially part of a through air-motor service extends beyond the air carrier's terminal area and must be considered to be a line-haul motor service of an independent motor carrier. It was determined that the former was within the exemption of section 203(b)(7a) while the latter was not.

It was recognized in the *Kenny* case, that a reasonable terminal area for an air carrier at particular points may be different from that of a land carrier, and the report indi-

8. ATA, Local Cartage National Conference, Air Cargo, Inc., and various rail and motor carriers.

9. All later references to the *Kenny* case concern the report on further hearing, 61 M. C. C. 587.

cated that the terminal areas established by the air carriers in tariffs filed with the C. A. B. would ordinarily be acceptable.[10] The division stated, 61 M. C. C. at 596:

> In addition, this interpretation is sufficiently flexible to adapt itself to any future reasonable enlargement or curtailment of air terminal areas by the air carriers themselves which may be accomplished, and properly so, by changes in the present so-called terminal area tariffs of these air carriers on file with the C. A. B. The air carriers now establish their terminal area limits by filing of tariffs with the C. A. B., and *our interpretation of the exemption of section 203(b)(7a) is based on the assumption that that agency would not hesitate to reject any publication which would result in an unreasonable enlargement of such an area.* [Emphasis added.]

Prior decisions, except those involving the Railway Express Agency, were overruled to the extent that they were inconsistent with the decision in the *Kenny* case.

The *Kenny* doctrine has been applied uniformly since that decision. Applications have been dismissed in instances involving motor carrier service performed under through airline bills of lading pursuant to a contract with an airline and within the published terminal area of the airline;[11] or the *Kenny* case has been distinguished where the proposed operations were not to be performed under a through bill of lading or involved movements beyond the

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10. At the time the *Kenny* case was decided, the C. A. B. ordinarily used as a rule of thumb for determining the reasonableness of airline terminal areas a radius of 25 miles from the cities served by the air carrier filing with it tariffs offering terminal services. Except for major air traffic points such as New York and Chicago, it has continued to limit air carrier terminal areas to such a 25-mile radius.

11. *Commodity Haulage Corp. Common Carrier Application*, 69 M. C. C. 527, and *Scari Extension—Airports*, 76 M. C. C. 319, 323.

limits of the airline terminal area, thus requiring operating authority from this Commission.[12]

In *Panther Cartage Co. Extension—Air Freight*, 88 M. C. C. 37 (decided October 4, 1961), we confirmed the doctrine of the *Kenny* case and extended it to cover air freight forwarders, which are defined and classified as indirect air carriers.[13] We found there that where an indirect air carrier handles the line-haul air transportation, the proposed motor transportation of property in order to come within 203(b)(7a) exemption must be confined to the transportation, in bona fide collection, delivery, or transfer service, of shipments which have been received from, or will be delivered to, an air carrier as a part of a continuous movement under a through air freight forwarder bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier. It was also held that where the involved shipments move under the bill of lading of an air freight forwarder, the collection, delivery, or transfer service must be confined to such points named in the indirect air carrier's terminal area tariffs as are within the terminal area tariff of the direct air carrier actually performing the air portion of the line-haul movement.[14]

We have always considered in a different light emergency motor transportation performed as a substitute for transportation by air. It was found in the *Graff* case, *supra*, that the transportation of passengers performed sporadically, in emergency situations arising from the inability

12. *Gromand Common Carrier Application*, 72 M. C. C. 257; *Southern Pacific Transport Co.—Air Freight*, 73 M. C. C. 345, 346; *Fischer Common Carrier Application*, 83 M. C. C. 229; and *Scari*, cited in footnote 11. In the *Scari* case, division 1 held that Philadelphia, Pa., and Wilmington, Del., (each served by its own airport) were not within the same terminal area, and therefore the transportation proposed therein was not within the partial exemption of section 203(b)(7a).

13. *Air Freight Case*, 9 C. A. B. 473, and 14 CFR 296.2(a).

14. Our conclusions in the instant proceeding, as will be noted later herein, differ in certain respects from those of the *Panther* case.

of the air carrier to provide air service due to adverse weather conditions, equipment failure, or the like, was incidental to transportation by aircraft, even though the operations might be conducted between airports as much as 200 miles apart. Division 5 made the following comment on this type of operation, 48 M. C. C. at 315-16:

> Clearly, the operations here involved are interterminal and intercity line-haul operations but they are unusual and different from ordinary connecting-carrier line-haul operations in certain respects. Connecting-carrier line-haul motor operations are complementary to air-transportation services with which they connect and are conducted regularly as a part of through interline service. In contrast the operations here involved, though line-haul, are sporadic and irregular in point of time and emergency in character. They are furnished at the airline's expense and serve as a substitute for impossible or impracticable air transporation and not as a complement to regular air service. They are clearly subordinate to the regular air service; a necessary result or adjunct of it, without which, or its equivalent in some form, maintenance of regular air service would be more hazardous if not wholly impracticable on many occasions.

In applications decided since the *Graff* case [15] the Commission has consistently applied the doctrine of that case without modification. As recently as the *Panther* decision, *supra*, the *Graff* holding was reaffirmed, and that portion of the *Panther* application for authority to perform operations which are emergency in character was dismissed as being within the partial exemption of section 203(b)(7a) of the act.

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15. See *Michaud Common Carrier Application*, 73 M. C. C. 677, and *Fischer Common Carrier Application, supra*. Although *Graff* was not cited in the *Fischer* decision, the rule first applied in *Graff* was stated at 83 M. C. C. 234 as controlling when adverse weather conditions prohibit air service between Galion and Cleveland, Ohio.

Also pertinent to the issues here before us is the decision of the Court of Appeals for the District of Columbia in *City of Philadelphia v. Civil Aeronautics Board,* 289 F. 2d 770, hereinafter called the *Flying Tiger* case, in which the court upheld a decision of the C. A. B. which had found that a proposed operation of Flying Tiger Air Line would as to the airline itself constitute air service at Philadelphia in spite of the fact that it did not intend to utilize the Philadelphia airport but, instead, to serve that city through the use of motor service from the Newark, N. J., airport, about 90 miles away. Although the petitioner, City of Philadelphia, had expressly agreed at a prehearing conference that the case should proceed on the basis that the airline was conducting its trucking operation (between Philadelphia and the Newark Airport) under lawful authority, it raised the issue on appeal that the motor carrier portion of the proposed operation did not qualify as partially exempt under section 203(b)(7a) of the Interstate Commerce Act. Assuming without deciding whether such a question could be raised in view of the agreement at the prehearing conference, the court thought that the C. A. B. adequately and correctly disposed of it in its order when it said:

> Philadelphia makes the subsidiary argument that the Philadelphia-Newark truck haul is subject to the jurisdiction of the Interstate Commerce Commission. Our finding goes no further than that Flying Tiger Lines' proposed service will, as to it, constitute air transportation and that in rendering service to the airports proposed Flying Tiger Lines will be fulfilling its obligations under its certificate. We are not asserting jurisdiction over the motor carrier as an air carrier nor are we determining the status of the truck operation under the Interstate Commerce Act. Whether the Philadelphia-Newark truck haul should be considered as incidental to air transportation within the meaning of the Interstate Commerce Act, and thereby exempt from economic regulation of that statute, is a matter

for the Interstate Commerce Commission. We do not intend that our action here should influence what that decision should be. If the Commission should conclude under the standards normally applied by it that the truck operation is not exempt, the trucker must have and obtain the requisite I. C. C. authority in order for Flying Tiger Lines to operate in the manner it proposes.

JURISDICTION

Certain parties, including the direct air carriers, air freight forwarders, and unregulated motor carriers specializing in gound movements of airfreight, contend that this Commission is without jurisdiction to enter an order or rule defining generally motor transportation "incidental to transportation by aircraft" as set forth in section 203(b)(7a) of the act, or to prescribe by regulation limits to the areas in which the exemption applies. They argue (1) that this section is a positive and self-defining legislative directive, imposed by section 1107(j) of the Civil Aeronautics Act of 1938, to protect the jurisdiction of the C. A. B. in the regulation of transportation by air, (2) that any limiting interpretation which we may place upon the partial exemption might serve to thwart the C. A. B. in carrying out its congressional directive to develop airfreight service, and that at any rate, the C. A. B. could defeat such action by this Commission merely by amending the airlines' certificates in order to permit service at points found by us to be beyond the scope of the exemption, (3) that the instant proceeding creates a direct conflict with the C. A. B.'s pending rulemaking proceeding, (4) that the intent of Congress as expressed in the Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958, and most particularly in sections 101(20) and (21), 102, 403(a), 404 and 412(a) of the latter was to place in the C. A. B. sole jurisdiction to regulate air transportation and surface transportation performed in connection therewith, and (5) that the

congressional intent, as it is interpreted by these parties, is fully justified, as is evidenced by the C. A. B.'s action in the *Flying Tiger* decision, *supra,* which would be nullified were this Commission to assume jurisdiction over the motor operation between Philadelphia and Newark and deny to the airline the right to provide such service without motor carrier operating authority. The Air Freight Forwarders Association contends that in view of the fact that section 203(b)(7a) of the act was enacted as a part of the Civil Aeronautics Act, there must be implied therein the phrase "as defined in the Civil Aeronautics Act" similar to the explicit limitation contained in the 203(b)(5) partial exemption which refers to the Agricultural Marketing Act.

Section 203(b)(7a) provides for an exemption from the economic regulation of this Commission of motor transportation when "incidental to transportation by aircraft." Section 204(a)(6) makes it our duty "to administer, execute, and enforce all provisions" of part II of the act and "to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration."

Admittedly, there is no provision of the act conferring "specific" authority to determine what motor operations come within the 203(b)(7a) partial exemption; but incontrovertibly and of necessity the duty "to administer," "to regulate," and "to make all necessary orders * * * and to prescribe rules and regulations" includes the power to define the terms used in the Interstate Commerce Act in accordance with the legislative intent. The very extent of the duty to administer and the duty to regulate depends upon and is limited by the scope of any exemption from regulations which the act provides. Clearly we must have, included in the power "to administer" the act and "to regulate," the power to determine the scope of any partial exemption from regulation. Compare *American Trucking Assns., Inc. v. United States,* 344 U. S. 298.

To say, as several interested parties do, that we have no power by general order to establish a rule by which to determine the limits of the involved exemption or that we must accept the C. A. B.'s interpretation of "service in connection with * * * air transportation," would be to ignore the practicalities of the situation and the past precedents by this Commission in interpreting the involved partial exemption. In addition, following such a course would invite illegal and unauthorized motor operations and, as a consequence thereof, a pethora of complaints calling for individual consideration which would unduly burden both the industry and this Commission in its regulation of motor carriers subject to part II of the act, and would defeat the very purpose of the partial exemption.

GENERAL CONTENTIONS OF THE PARTIES

The representations have been considered. Many helpful suggestions as to the regulations which we should adopt have been made—suggestions which, of course, vary greatly in their approaches to the situation and in the scope of the exemption which they envisage. Air Cargo, Inc., which acts as the agent of many scheduled air carriers in obtaining motor service for them, urges adoption of a rule which would follow the rationale of the *Kenny Panther*, and *Graff* decisions. This would have the effect of establishing as a limit to the maximum territorial scope of the exemption, except for emergency transportation, the terminal area of the direct air carrier transporting the shipment, as defined in its tariffs filed with and accepted by the C. A. B. Indirect air carrier associations, individual air freight forwarders, various uncertificated motor carriers, and certain other interested parties advocate an interpretation of section 203(b)(7a) exempting the collection, transfer, or delivery services within a terminal area having radii varying from 25 to 125 miles. While the last-named parties generally support the proposal embraced in the supplemental notice, most of them urge that the contemplated restrictions as to

air freight forwarder operations outside the terminal area are unnecessary, and that the shipping public is entitled to a single source of responsibility. The Air Freight Forwarders Association, by way of alternative, suggests that we impose a simple prohibition against the holding out by air freight forwarders that they act as a common carriers or surface freight forwarders prior to receiving shipments from or subsequent to delivering shipments to authorized carriers beyond the forwarder's terminal area.

One common carrier specializing in collection and delivery of air traffic asserts that all traffic having a prior or subsequent movement by air falls within the involved 203 (b)(7a) partial exemption. A manufacturer of critical defense items and an air freight forwarder urge the adoption of a so-called length-of-line-haul test which would exempt the motor transportation of traffic having a prior or subsequent air movement in all instances where the ground distance does not exceed the air distance. A noncertificated motor carrier engaged almost entirely in the handling of airfreight seeks an expansion of the section 203(b)(7a) exemption so as to cover all bona fide "incidental to-air operations without regard to (1) the type of billing utilized, (2) whether the carriage is performed as the agent of the shipper or that of the carrier (3) whether the shipment is domestic or international in character (4) whether the traffic is handled solely within an air carrier terminal area."

The motor carriers holding authority from this Commission and associations of such carriers take the view that the geographical limits of the section 203(b)(7a) exception should be much more restricted than those urged by the uncertificated motor carriers, the air carriers, and the air freight forwarders. They further urge that the same limits be imposed on the operations of air freight forwarders as on those of direct air carriers, and two associations contend that the supplemental notice envisions preferential treatment for air freight forwarders without legal or philosophic justification. One motor carrier argues that section

203(b)(7a) should be construed as exempting only collection, delivery, or transfer service which is occasional or casual or is performed in emergencies. Another party asks that the exemption be limited in scope to operations between airports, on the one hand, and, on the other, points within the commercial zone of the city or cities served by a given air terminal. Several parties suggest an approach similar to that followed in *Central Truck Lines, Inc. v. Pan-Atlantic S. S. Corp.*, 82 M. C. C. 395, wherein a determination was made as to the extent a water carrier could provide terminal services in the area surrounding ports it served. Although finding that the terminal area of a water carrier might, in some circumstances, extend beyond that of motor carriers serving the same point, as defined in *Commercial Zones and Terminal Areas*, 54 M. C. C. 21 (sixth supplemental report), the division followed the rationale of the *Terminal Areas* case. It stated, 82 M. C. S. at 404:

> Any service which goes beyond a single homogeneous community, identifiable as such by the factors of commercial and industrial integrity, population and business density, and the existence of some reasonably compact limit to the geographical scope of community affairs and influence, is intercommunity in character and cannot be considered as bona fide collection, delivery, and transfer service.

A number of the authorized motor carriers submitting representations urge that the precedent established in the *Graff* case, and followed since in dealing with emergency transportation, be modified restrictively. They cite examples of motor transportation allegedly performed unlawfully, under the guise of service provided due to emergency or adverse weather conditions. They claim that solicitors of airfreight often knowingly accept tonnage in excess of the capacity of scheduled flights, and then route overflow traffic by unauthorized motor carriers on the ground that an emergency situation exists.

DISCUSSIONS AND CONCLUSIONS

Although the air transportation industry was still in its infancy in 1938 when section 203(b)(7a) became part of the Interstate Commerce Act, it was already evident to Congress that airlines were engaged in the transportation of package express in addition to passengers, and that in the absence of an exemption, motor carriers transporting such packages within the municipalities served by the airlines would be subject to economic regulation of that act, as well as of the Civil Aeronautics Act of 1938. We believe that Congress must have had in mind at that time the probable future importance of air transportation, and that it intended by the enactment of section 203(b)(7a) to provide a statutory framework for its orderly growth.

Terminal services.—In issuing an interpretative regulation, as in all the other aspects of our administration of the Interstate Commerce Act, we are, of course, governed by the terms of the statute itself. From the clear language of section 203(b)(7a), it must be immediately apparent that this section does not exempt from the economic regulation of the act all motor transportation which bears a relationship, however remote, to transportation by aircraft, but only that motor transportation which is "incidental to transportation by aircraft." The key word here, we think, is "incidental." In the absence of any definitive legislative history or evidence to the contrary, we believe, having reviewed our past decisions involving section 203(b)(7a), that our prior interpretation is essentially correct, is consistent with the intent of the Congress, and is consonant with the aims of the national transportation policy.

In the *Kenny* case, "incidental" was defined as follows, 61 M. C. C. at 595:

> Motor transportation is "incidental" to transportation by air when that motor transportation is limited to a bona fide collection, delivery, or transfer service within a reasonable terminal area of the air carrier.

> Conversely stated, such motor transportation is not "incidental" to transportation by air when it is transportation having the character of a connecting-carrier line-haul service.

Webster's New International Dictionary, third edition (1962), defines incidental as:

> * * * subordinate, nonessential, or attendant in position or significance: as a: occurring merely by chance or without intention or calculation: likely to ensue as a chance or minor consequence—usually used with to * * * c: lacking in effect, force, or consequence: not receiving much consideration of calculation * * *

It is also helpful, we believe, to consider the meaning given to the term "incidental" in another section of part II of the Interstate Commerce Act—section 202(c), passed soon after section 203(b)(7a) was enacted. Section 202(c) clearly implies that "incidental" motor transportation is that performed within the terminal areas of line-haul carriers and consists of "collection, delivery, and transfer" service.

Having considered once again all the matters discussed above, we are convinced that the *Kenny* case was correct in finding that motor transportation, to come within the scope of the incidental-to-aircraft exemption, must be "confined to the transportation in bona fide collection, delivery or transfer service of shipments which have been received from, or will be delivered to, an air carrier as part of a continuous movement under a through air bill of lading covering in addition to the line-haul movement by air the collection, delivery, or transfer service performed by motor carrier." 61 M. C. C. at 595.

The *Kenny* case went on to find that there was no need to define specifically the geographical limits within which exempt transportation might be performed. Instead, it provided only that in order to come within section 203

(b)(7a), transportation must be performed within the terminal area established by the line-haul air carrier in tariffs filed with the C. A. B. The assumption underlying this approach to the determination of the scope of the exemption was that the C. A. B. would not hesitate to reject a publication which would result in an unreasonably large exempt area. Our reevaluation of the situation in the light of the representations filed in the instant proceeding convinces us that this aspect of the *Kenny* decision, too, is correct and that the imposition of a definite mileage limitation is unnecessary. In reaching this conclusion, we have attached considerable significance to the representations of several of the parties specializing in the transportation of airfreight. They have taken the position that the present standard has encouraged the development of airfreight service, and that it should be retained. The C. A. B.'s actions since the promulgation of the *Kenny* criteria, particularly as reflected in the rules, contained in Appendix II hereto, which it has adopted, clearly illustrate that agency's reluctance to sanction any wholesale expansion of air-carrier terminal areas beyond the 25-mile rule of thumb which it has used for many years.

In deciding not to fix a maximum mileage limitation for the 203(b)(7a) exemption, we are obviously disagreeing with the contentions of various parties, including petitioners, that shippers and receivers in areas adjacent to cities and communities have the same need for all modes of transportation—rail, express, water, motor vehicle, and air; and that, therefore, the terminal areas of carriers of all modes should be identical. Each mode of transportation has its inherent advantages. Compare *Seatrain Lines, Inc., Extension—Savannah*, 285 I. C. C. 509, and *Schaffer Transp. Co. v. United States*, 355 U. S. 83. Various economic and geographic factors sometimes prompt utilization of one mode of transportation over others. In *Kenny, supra*, we recognized that the *modus operandi* of air carriers is sufficiently different from that of land carriers as to justify

special consideration in the matter of terminal area limits which may or may not be somewhat larger than those of land carriers. Compare *Pick-up of Livestock in Illinois, Iowa, and Wisconsin,* 238 I. C. C. 671, 248 I. C. C. 385, and 251 I. C. C. 549, and *Newtex S. S. Corp., Collection and Delivery Service,* 273 I. C. C. 304. Likewise, in the *Terminal Areas* case, *supra,* we noted additional reasons why terminal areas for non-land transportation carriers varied from those of motor carriers and freight forwarders subject to the act. Compare *Pan-Atlantic, supra.*

Some parties argue for an interpretation of section 203(b)(7a) which would allow the performance of exempt motor operations in areas extending up to 125 miles from airports, and some, in supporting a "length-of-line-haul" test or simply a "prior-or-subsequent-movement" test, would have the scope of the exemption extended even further. In our opinion such a theory would be in direct conflict with sections 206 and 209 of the act, and particularly of the national transportation policy, which requires that we recognize and preserve the inherent advantages of each mode of transportation subject to our regulation. We would not be complying with the congressional mandate were we to adopt, in the absence of a clear legislative directive, a regulation which would greatly increase the scope of exempt transportation at the expense of those motor carriers which are subject to the economic regulation of the Interstate Commerce Act.

In general, then, we are here reaffirming the decision in the *Kenny* case. However, it is clear from the record before us that many airfreight users are establishing plants outside the present terminal zones which air carriers have heretofore been allowed to establish in tariffs filed with the C. A. B. In recognition of this factor, the C. A. B., in its rule 222.3, reproduced in appendix II, is providing an application procedure whereby air carriers can seek permission to file tariffs offering pickup and delivery service at points beyond 25 miles of the airport or city limits of

certificated points. Under the *Kenny* decision, the geographical limit of the section 203(b)(7a) exemption at a given point would expand automatically should the C. A. B. allow air carriers to extend the area in which they offer terminal services. To permit such expansion without our retaining some control over it would, in our opinion, not be consistent with our statutory responsibility to insure that transportation partially exempt under section 203(b)(7a) is truly "incidental" to transportation by aircraft. We shall, therefore, make available a procedure whereby the geographical extent of the incidental-to-aircraft exemption can be individually determined. To achieve this purpose we will adopt regulations which will reflect the definition of the exemption originally made in the *Kenny* case but which will further provide that, either upon our own motion or upon petition of any interested person, a proceeding may be instituted looking toward the definition of the geographical extent of the 203(b)(7a) exemption at a particular point. In deciding this question, prior action of the C. A. B. allowing air carriers to publish extended terminal service tariffs would be considered, but would not be determinative.

Emergency transportation.—We come now to a consideration of substituted motor-for-air transportation performed in emergency situations. We think that the approach taken to this problem in the *Graff* decision and followed since then is sound and should be followed in the future. If the shipping public is to be served, carriers should be in a position to deliver airfreight even if the plane carrying it must, because of bad weather, for example, land at an airport far removed from the scheduled destination, or if a plane, because of equipment failure beyond the control of the direct air carrier, is not available. Consequently, we do not believe that it is advisable to attempt to set any specific mileage limit within which such emergency motor transportation must be performed if it is to fall within the scope of the section 203(b)(7a) exemption. We

wish to stress that motor transportation to fall within this category and thus to be exempt from our economic regulation must be truly emergency in character, and the rule to be adopted here will provide that it must be caused by conditions beyond the control of the air carrier. For example, it is apparent that several of the parties, particularly the air freight forwarders and uncertificated motor carriers, solicit air-freight without regard to the capacity of cargo planes scheduled to depart; and, at times, in total disregard of known capacities. The fact that existing available cargo space has been oversolicited does *not* constitute an emergency situation beyond the control of the air carrier such as would bring a substituted motor-for-air service within the ambit of section 203(b)(7a). Likewise, the fact that a city is served by an airport which is not equipped to receive jet cargo planes cannot be construed as clothing an operation from or to the nearest jet airport with the character of an emergency.

The decision as to what constitutes adverse weather or an emergency or impractical flying condition, is, in our opinion, one that must be made by the direct air carriers and their officials in the interest of public safety. In any case, whenever air traffic moves in substituted motor-for-air line-haul operations by an uncertificated motor carrier, there must exist some adverse weather o impractical condition or situation as decided by the *officials of the direct air carrier*, even though the involved traffic is moving on a through air freight forwarder's bill of lading.

Participation of air freight forwarders in air-motor transportation.—As was indicated by our supplemental notice of proposed rulemaking, issued October 17, 1963, we are not completely satisfied with the result reached in the *Panther* case. That decision held that the incidental-to-aircraft exemption applies to the transportation of shipments having a prior or subsequent movement by air freight forwarder only to the extent that the motor movement takes place within the terminal area of the direct air

carrier performing the line-haul transportation. Further consideration convinces us that whether a shipment moves under the billing of a direct air carrier or an air freight forwarder should have no effect upon the operation of the exemption. The Federal Aviation Act classifies both as air carriers, and an air freight forwarder is considered by the C. A. B. to be an air carrier. Also, the *Panther* decision may result in the anomalous situation in which an air freight forwarder, given the choice of utilizing one of the two direct air carriers between the same airports would find that a shipment transported by one could move overland in exempt motor service, while a shipment transported by the other could not. The rules adopted herein will not distinguish between direct and indirect air carriers, and the *Panther* case, to the extent inconsistent with this conclusion, is overruled.

The *Panther* case also held that any person "performing the functions of a freight forwarder" and "using" or "employing" motor carrier service between an airport and points beyond the terminal area of a direct area carrier serving that airport is a surface freight forwarder which requires operating authority under part IV of the Interstate Commerce Act. It was not intended by this decision to foreclose completely transportation service in which a shipment moves in part under the responsibility of an air freight forwarder and in part under the responsibility of a motor carrier subject to the act. The *Panther* holding was directed only to those activities of air freight forwarders which amount to surface freight forwarding under part IV of the Interstate Commerce Act. Some parties to this proceeding, however, have apparently construed this decision as precluding air freight forwarders, under any circumstances, from turning shipments over to or receiving shipments from motor carriers for the performance of regulated transportation. As thus interpreted, the *Panther* case has unnecessarily impeded freight forwarder participation in air-motor service, and it was the purpose of the

supplemental notice of proposed rulemaking to suggest a means of rectifying this situation.

An increasingly large volume of air freight is being handled by air freight forwarders, and a substantial portion of their traffic moves to or from points beyond the published terminal areas of air carriers. In such a situation the shipper normally is charged (1) the air forwarder's rates for service between the air terminal cities, and (2) the motor carrier's published charges for service between the air terminal city and the ultimate origin or destination point. Such air forwarder service is similar to that furnished by direct air carriers through connection with motor carriers, and, as a general rule, it appears that the shipping documentation clearly apprises the consignor or consignee that a connecting service is being performed and that the forwarder has no common carrier responsibility for the shipment while it is under the motor carrier's control. Such operations do not, we think, constitute surface freight forwarding under part IV of the Interstate Commerce Act. See *Alaska Freight Lines, Inc., v. Puget Sound Tug & Barge,* 94 M. C. C. 376. The considered operations are an integral part of what is patently a useful service to the shipping public, and as the line-haul surface movements will, of necessity, be performed by regulated motor carriers, we anticipate no adverse effect on such carriers as a result of our conclusions.

The supplemental notice of proposed rulemaking suggested a *modus operandi* whereby air freight forwarders could receive from or turn over to authorized motor carriers shipments the motor transportation of which does not come within the partial exemption of section 203(b)(7a). These standards appear to reflect the type of operation actually being conducted by some air forwarders, and the operations of others seem to be readily adaptable to their requirements. The regulations which we will adopt herein, and which are substantially the same as those proposed, will restrict air freight forwarders against holding out, in

any manner, that they assume or will assume responsibility for any shipment prior to its receipt from or after delivery to an authorized motor carrier for movement beyond the forwarders' terminal area. We will also forbid the receipt by an air forwarder of compensation from shippers for motor carriers for services rendered in connection with the receipt of shipments from or the delivery of shipments to a motor carrier performing regulated transportation. In reaching the conclusion that these limitations on the air freight forwarders' participation in surface transportation are necessary, we should point out that we are fully cognizant of the advantages which might accrue to the shipping public from a forwarding service able to assume complete responsibility from actual origin to ultimate destination. The assumption of such responsibility by air freight forwarders, however, would result in their instituting surface forwarding operations in violation of the licensing provisions of section IV of the Interstate Commerce Act.

Ultimate Conclusions and Findings

In conclusion, we must deal with the assertion made by several of the parties that this Commission is attempting to regulate air transportation. Congress, through the Interstate Commerce Act, has directed this Commission to maintain a strong and balanced motor carrier transportation system in furtherance of a national transportation policy. A review of the various sections of the Federal Aviation Act and the Interstate Commerce Act which were cited by various parties of record convinces us that the actions taken herein are in accordance with the national transportation policy and the past decisions of this Commission and do not conflict with the Federal Aviation Act, or the existing rules and regulations of the C. A. B. Our interpretation of the involved exemption conforms to the general practice of construing strictly any exemption. Any broader construction would without justification, serve only to divert traffic from authorized motor carriers and thereby defeat various

sections of the Interstate Commerce Act and the national transportation policy stated therein.

We find that title 49, chapter 1 of the Code of Federal Regulations requires modification by the addition thereto of section 210.40, "Motor Transportation of property incidental to transportation by aircraft," and part 404, "Exemptions," section 404.1, "Use by air freight forwarders of regulated motor common carrier service," containing the rules set forth in appendix III hereto; and that such rules are reasonable and necessary and should be prescribed.

An appropriate order will be entered.

VICE CHAIRMAN WEBB, dissenting:

Section 203(b)(7a) became law by virtue of the enactment of section 1107(j) of the Civil Aeronautics Act of 1938, 52 Stat. 1029. The Civil Aeronautics Act was repealed in its entirety by the Federal Aviation Act of 1958, although some provisions of the former act were reenacted by the latter. The reenactment did not include section 1107(j) nor any similar provision.

Section 203(b)(7a) has not been reenacted as part of the Interstate Commerce Act. Its continued existence was wholly dependent upon the continuance of section 1107(j) or a reenactment thereof. Repeal of the Civil Aeronautics Act without the reenactment of section 1107(j) must be regarded as repealing section 203(b)(7a).

It is highly probable that the Congress did not intend to repeal section 203(b)(7a). However, I do not believe that the search for legislative intent may be pressed so far as to resurrect a statute which does not actually exist. It is one thing to probe for congressional intent underlying a presently effective law, but it is quite a different matter to find that the Congress did not repeal what it very plainly did repeal.

In the final analysis, it is impossible to be absolutely sure that the repeal of section 203(b)(7a) was unintentional. The Congress might have felt that jurisdiction to fix the geographical limits of the incidental-to-air exemption should reside exclusively in the Civil Aeronautics Board under the powers conferred upon the Board by sections 101(20) and (21), 102, 403(a), 404, and 412(a) of the Federal Aviation Act of 1958. If that was the Congress' intent, it would have been consistent with a desire to avoid conflicting determinations of exempt incidental-to-air operations on the part of the Board and this Commission.

COMMISSIONER HERRING did not participate.

APPENDIX I.

Parties to the proceeding.

PETITIONERS.

American Trucking Associations, Inc.
National Motor Freight Traffic Association, Inc.
Indiana Motor Rate & Tariff Bureau, Inc.
Middle Atlantic Conference.
The New England Motor Rate Bureau.
AAA Trucking Corp.
A & H Truck Line, Inc.
The Adley Express Company.
Associated Transport, Inc.
Best Way of Indiana, Inc.
Branch Motor Express Co.
Bronx Despatch.
Chesapeake Motor Lines, Inc.
Commercial Motor Freight, Inc., of Ind.
Corey & Evans, Inc.
The Davidson Transfer & Storage Co.
Eastern Freight Ways, Inc.
Elgin Storage and Transfer Co.
Estes Express Lines.
Federal Express, Inc.
Fowler & Williams, Inc.
Haeckl's Express, Inc.
Harder's Express, Inc.
Hemingway Bros. Interstate Trucking Co.
Hermann Forwarding Company.
I. R. C. & D. Motor Freight, Inc.
Indianapolis & Southern Motor Express, Inc.
Ray Jones, d/b/a, Jones Transfer.
Kirby & Kirby, Inc.
McDaniel Freight Lines, Inc.
Merchants Freight, Inc.
Motor Freight Corporation.
Oneida Motor Freight, Inc.
Over-Nite Motor Service, Inc.
Pinter Bros., Inc.
R. D. Motor Express, Inc.
Red Star Express Lines of Auburn, Inc.
Reich Bros. Long Island Motor Freight, Inc.
Rupp-Southern-Tier Freight Lines, Inc.
Shein's Express.
Styles Express, Inc.
Tose, Inc.
Troiano Express Co., Inc.
Wooleyhan Transport Co.
Ziffrin Truck Lines, Inc.

OTHER INTERESTED PARTIES.

Air Cargo, Inc.
Air Dispatch, Inc.
Air Freight Forwarders Association.
Associated Truck Lines, Inc.
Blue Bonnet Express, Inc.
Brown Express Lines, Inc.
Central Freight Lines, Inc.
Direct Airport Service, Inc.
Eastern Industrial Traffic League, Inc.
East Texas Motor Freight Lines, Inc.
Edward H. Pollaci.
Emery Air Freight Corporation.
Film Carrier Conference of the ATA.
Georgia Highway Express, Inc.
Gillette Motor Transport, Inc.
Herrin Transportation Company.
Kellogg Communications Systems Dept.
Missouri Public Service Commission.
National Association of Motor Bus Owners.
National Bus Traffic Association, Inc.
National Film Carriers, Inc.
National Small Shipments Traffic Conference, Inc.
Norwalk Truck Lines of Delaware, Inc.
Norwalk Truck Lines, Inc.
Oklahoma City (Okla.) Chamber of Commerce.
Port of New York Authority.
Smith Cartaging.
State Corporation Commission of the State of Kansas.
Voss Truck Lines, Inc.
Western Truck Lines, Inc.
Wings and Wheels Express, Inc.
Wycoff Company, Incorporated.

APPENDIX II.

Regulations adopted by the Civil Aeronautics Board on April 28, 1964.

14 C. F. R. 222—Air Cargo Pickup and Delivery zones; Filing of Tariffs; Application for Authority to File.

§ 222.1 *Applicability.*

This part is applicable to the provision of pickup and delivery services in connection with air transportation of property at any point within the United States or its territories and possessions by any carrier subject to Part 221 of the Board's Economic Regulations.

§ 222.2 *Filing of Tariffs.*

In accordance with the provisions of Part 221 and this regulation, each carrier shall file tariffs covering all pickup and delivery services offered. Such tariffs will be accepted for filing if they meet the requirements of Part 221 and (a) provide for service to places which are not located beyond a radius of 25 miles of the airport of the city limits of the certificated point, or (b) provide for service to places or areas included in other currently effective pickup and delivery tariffs on file with the Board, or (c) are authorized upon application of the carrier filed in accordance with section 222.3 hereof. A certification shall accompany each tariff filing identifying the category within which each pickup and delivery service falls.

§ 222.3 *Service to Locations Not Previously Authorized.*

(a) *Application.* If a carrier, subject to this part, desires to file a tariff providing for pickup and delivery service to any location(s) not authorized by section 222.2 of this part, such carrier shall file with the Board a written

application for authority to do so. Such application, in an executed original and nineteen copies, shall be conspicuously entitled "Application for Tariff-filing Authority: Pickup and Delivery Zone"; shall clearly identify the location(s) for which tariff-filing authority is requested; shall state the reasons why service to such location(s) is deemed appropriate and set forth economic data and other facts relied upon; shall contain a notice that persons served may, within 15 days, file and serve an answer in support of or in opposition to the application; shall set forth the names and addresses of the persons required to be served and state that service has been made on all such persons by personal service or by registered or certified mail, and the date of such service. In the case of service by mail, the date of mailing shall be considered the date of service. Each copy of an application served pursuant to this Part shall state that such service is made pursuant to Part 222 of the Civil Aeronautics Board's Economic Regulations.

(b) *Service of Application.* A copy of each application shall be served upon such persons as the Board may designate in a particular case, and in all cases shall be served upon each scheduled air carrier and air freight forwarder which regularly renders service to or from a point involved, and upon the Secretary, Interstate Commerce Commission, Washington 25, D. C. The Board shall also publish notice of the application in the Federal Register.

(c) *Answers.* Any interested person may file an answer with the Docket Section of the Board in opposition to or in support of an application. In the case of persons served by the applicant under paragraph (b), answers shall be filed no later than 15 days after the filing of the application. In the case of other interested persons, answers shall be filed no later than 15 days after publication of notice of the application in the Federal Register. An answer shall be filed in an executed original and nineteen copies. It shall set forth in detail the reasons for the position taken and include such economic data and facts as are relied upon.

It shall also be served upon the applicant and state the date of such service. Unless ordered by the Board upon application or upon its own motion, further pleadings will not be entertained.

(d) *Order of Approval.* Tariffs to which this paragraph relates shall not be filed unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation.

(e) *Effectiveness of Authority.* Authority to include any location(s) in a pickup and delivery tariff granted pursuant to the procedure of this section shall be subject to revision or revocation without evidentiary hearing.

APPENDIX III.

Regulations adopted.

A.

49 C. F. R. 210.40. Motor transportation of property incidental to transportation by aircraft.

(a) Property moving in collection, delivery, or transfer service.—Transportation of property by motor vehicle is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) of the Interstate Commerce Act provided (1) that it is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct air carrier or air freight forwarder (indirect air carrier) providing the line-haul transportation, which terminal area, if the line-haul air transportation is provided by a carrier subject to economic regulation under the Federal Aviation Act, has been described in a tariff filed with and accepted by the Civil Aeronautics Board, and (2) that it is confined to the transportation of shipments which have been received from or will be delivered to a direct air carrier or air freight forwarder as part of a continuous movement which, if provided by an air carrier subject to economic regulation under the Federal Aviation Act, shall be provided for in tariffs filed with and accepted by the Civil Aeronautics Board, and shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier.

(b) Substitution of motor-for-air transportation due to emergency conditions.—Transportation of property by motor vehicle is transportation incidental to transportation by aircraft if it constitutes substituted motor-for-air service, performed at the expense of the direct air carrier or air

freight forwarder, on a through air bill of lading, in emergency situations arising from the inability of the direct air carrier to perform air transportation due to adverse weather conditions, equipment failure, or other causes beyond the control of the direct air carrier.

(c) Individual determination of exempt zones.—Upon its own motion or upon petition filed by any interested person the Interstate Commerce Commission may, in an appropriate proceeding, determine whether the area within which the transportation of property by motor vehicle, in bona fide collection, delivery, or transfer service, must be performed, in order to come within the provision of paragraph *(a)* of this section, should be individually determined with respect to any particular airport or city authorized to be served by a direct air carrier or air freight forwarder holding authority from the Civil Aeronautics Board, and whether there should be established therefor appropriate boundaries, differing in extent from the terminal areas of such direct air carriers or freight forwarders as defined in tariffs filed with and accepted by the Civil Aeronautics Board.

B.

49 CFR 404 *Exemptions.*

49 CFR 404.1 *Use by air freight forwarders of regulated motor common carrier service.*—An air freight forwarder (indirect air carrier) subject to economic regulation under the Federal Aviation Act may receive from or turn over to motor common carriers subject to economic regulation under part II of the Interstate Commerce Act shipments the transportation of which is not within the scope of the incidental-to-aircraft exemption of section 203(b)(7a) of the Interstate Commerce Act without being considered as conducting operations as a freight forwarder subject to part IV of the Interstate Commerce Act provided:

(a) That the air freight forwarder shall not hold out to assume responsibility for, nor make any claim in its advertising, solicitation of freight, or tariff publications that it will assume responsibility for, any shipment prior to its receipt from or after it is turned over to an authorized motor common carrier for movement beyond the air freight forwarder's terminal area as defined in tariffs filed with and accepted by the Civil Aeronautics Board.

(b) That all shipping documents issued by the air freight forwarder shall state clearly that its responsibility for the shipment does not extend beyond its actual air movement and the territorial extent of its terminal area as provided for in tariffs published with the Civil Aeronautics Board.

(c) That the air freight forwarder shall receive no compensation from any shipper or motor carrier for services rendered in connection with the receipt of shipments from or the delivery of shipments to a motor carrier for movement beyond the air freight forwarder's terminal area.

ORDER.

TITLE 49—TRANSPORTATION

CHAPTER 1—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER B—CARRIERS BY MOTOR VEHICLE

210—EXEMPTIONS

SUBCHAPTER D—FREIGHT FORWARDERS

PART 404—EXEMPTIONS

No. MC-C-3437.

MOTOR TRANSPORTATION OF PROPERTY INCIDENTAL TO TRANSPORTATION BY AIRCRAFT.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of May A. D. 1964.

IT APPEARING, That the Commission, division 1, by notice and order entered October 4, 1963, instituted the above-numbered proceeding under Part II of the Interstate Commerce Act (more specifically sections 204(a)(6) and 203(b)(7a) thereof) and section 4 of the Administrative Procedure Act to determine whether the facts and the circumstances require or warrant this Commission to define by regulation the transportation by motor vehicle that is is exempt from economic regulation under section 203(b)-(7a) of the Interstate Commerce Act, and for the purpose of taking such other and further action as the facts and circumstances may justify or require;

IT FURTHER APPEARING, That the Commission, by supplemental notice and order entered October 17, 1963, reopened this proceeding under parts II and IV of the act

(more specifically sections 204(a)(6) and 403(a) thereof) and section 4 of the Administrative Procedure Act to encompass certain other matters described in the said supplemental notice;

It Further Appearing, That said notice and orders entered October 4, 1961, and October 17, 1963, invited the participation of motor carriers, air carriers, or other interested person or persons by submitting for consideration written statements of facts, views, and arguments with the Commission at its office in Washington; and that notice to all interested persons was given through publication of the said notice in the Federal Register (26 F. R. 9569 and 28 F. R. 11235);

And It Further Appearing, That the Commission, on the date hereof, has made and filed a report herein setting forth the basis of its conclusions and its findings therein, which report is hereby referred to and made a part hereof;

It Is Ordered, That Title 49 CFR be, and it is hereby, amended by adding thereto section 210.40, Motor transportation of property incidental to transportation by aircraft, and part 404, Exemptions, section 404.1. Use by air freight forwarders of regulated motor common carrier service, containing the regulations set forth in Appendix III to the said report;

It Is Further Ordered, That this order shall become effective June 24, 1964, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And It Is Further Ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the office of the Secretary of the Interstate Commerce Commission at Washington, D. C., and by filing a copy with the Director, Office of the Federal Register.

[52 Stat. 1029, 49 U. S. C. 303(b)(7a); 52 Stat. 1237, 49 U. S. C. 304(a)(6); 66 Stat. 285, 49 U. S. C. 1003(a); 60 Stat. 237, 5 U. S. C. 1003]

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)